

**STATE OF TEXAS  
DEPARTMENT OF INFORMATION RESOURCES  
CONTRACT FOR PRODUCTS AND RELATED SERVICES**

**Network Appliance, Inc.**

**1. Introduction**

**A. Parties**

This Contract for products and related services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter "DIR") with its principal place of business at 300 West 15<sup>th</sup> Street, Suite 1300, Austin, Texas 78701, and Network Appliance, Inc. (hereinafter "Vendor"), with its principal place of business at 495 East Java Drive, Sunnyvale, California 94089.

**B. Compliance with Procurement Laws**

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Texas Building and Procurement Commission's Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-070, on September 7, 2005, for Data and Information Storage. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-070 shall be posted by DIR on the Electronic State Business Daily.

**C. Order of Precedence**

This Contract; Appendix A, Standard Terms and Conditions For Products and Related Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Pricing; Appendix D, Customer Software License; Appendix E, NetApp Support Services and Software Subscription Terms and Conditions; Vendor's Response to RFO DIR-SDD-TMP-070, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-070, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

**2. Term of Contract**

The term of this Contract shall be two (2) years commencing on the last date of approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend the Contract, upon mutual agreement, for up to two (2) optional one-year terms.

### 3. Product and Service Offerings

#### A. Products

Products available under this Contract are limited to Data and Information Storage as specified in Appendix C, Pricing. Vendor may incorporate changes to their product offering; however, any changes must be within the scope of products awarded based on the posting described in Section 1.B above.

#### B. Services

Services available under this Contract are limited to Data and Information Storage services as specified in Appendix C, Pricing. Vendor may incorporate changes to their service offering; however, any changes must be within the scope of services awarded based on the posting described in Section 1.B above.

### 4. Pricing

#### A. Manufacturer's Suggested Retail Price (MSRP)

MSRP is defined as the product sales price suggested by the manufacturer of a product.

#### B. Customer Discount

The minimum Customer discount for all products and services will be the percentage off MSRP as specified in Appendix C, Pricing.

#### C. Customer Price

1) The price to the Customer shall be calculated as follows:

$$\text{Customer Price} = \text{MSRP} - \text{Customer Discount}$$

2) Customers purchasing products and services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request. Vendor agrees it shall offer and make available this DIR Contract as first choice for all sales of Products and Services identified in Section 3. above to eligible Texas DIR Customers during its term.

3) If the standard pricing for the same products or services available under this Contract are provided at a lower price to an eligible Texas-based Customer, then the available Customer Price in this Contract shall be adjusted to that lower price. This Contract shall be amended in accordance within ten (10) business days to reflect the lower price.

**D. DIR Administrative Fee**

The administrative fee specified in Section 5 below shall not be broken out as a separate line item when pricing or invoice is provided to Customer.

**E. Shipping and Handling Fees**

The price to the Customer under this Contract shall include all shipping and handling fees. Shipments will be Free On Board Customer's destination. No additional fees shall be charged to the Customer for standard shipping and handling. If the Customer requests expedited delivery, Customer will be responsible for any charges for expedited delivery.

**F. Tax-Exempt**

As per Section 151.309, Texas Tax Code, Customers under this Contract are exempt from the assessment of State sales, use and excise taxes. Further, Customers under this Contract are exempt from Federal Excise Taxes, 26 United States Code Sections 4253(i) and (j).

**G. Travel Expense Reimbursement**

Pricing for services provided under this Contract are exclusive of any travel expenses that may be incurred in the performance of those services. Travel expense reimbursement may include personal vehicle mileage or commercial coach transportation, hotel accommodations, parking and meals; provided, however, the amount of reimbursement by Customers shall not exceed the amounts authorized by the current State Travel Regulations. Travel time may not be included as part of the amounts payable by Customer for any services rendered under this Contract. The DIR administrative fee specified in Section 4 below is not applicable to travel expense reimbursement. Anticipated travel expenses must be pre-approved in writing by Customer.

**H. Changes to Prices**

Vendor may change the price of any product or service at any time, based upon changes to the MSRP, but discount levels shall remain consistent with the discount levels specified in this Contract. Price decreases shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately.

**5. DIR Administrative Fee**

- A.** The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is two percent (2%). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$2,000 dollars.
- B.** All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to Vendor. Any change in the administrative fee shall be incorporated in the price to the Customer.

**6. Notification**

All notices under this Contract shall be sent to a party at the respective address indicated below.

If sent to the State:

Sherri Parks, Service Delivery Division  
Department of Information Resources  
300 W. 15<sup>th</sup> St., Suite 1300  
Austin, Texas 78701  
Phone: (512) 475-4700  
Facsimile: (512) 475-4759  
Email: sherri.parks@dir.state.tx.us

If sent to the Vendor:

Network Appliance, Incorporated  
Legal Department  
495 East Java Drive  
Sunnyvale, CA 94089  
Phone: (408) 822-6000  
Facsimile: (408) 822-4412  
Email: Apryl.lane@netapp.com

**7. Software License and Service Agreements**

**A. Software License Agreement**

1) Customers acquiring software licenses under the Contract shall hold, use and operate such software subject to compliance with the Customer Software License set forth in Appendix D of this Contract. No changes to the Customer Software License may be made unless previously agreed to between Vendor and DIR. Customers may not add, delete or alter any of the language in Appendix D. Order Fulfiller shall make the Customer Software License available to all Customers at all times.

2) Compliance with the Customer Software License is the responsibility of the Customer. DIR shall not be responsible for any Customer's compliance with the Customer Software License. If DIR purchases software licenses for its own use under this Contract, it shall be responsible for its compliance with the Customer Software License.

**B. Shrink/Click-wrap License Agreement**

Software provided in conjunction with the Equipment is licensed to Customer under the license provided by the software publisher or by the equipment manufacturer with which the software is provided. Customer shall, if required, execute a separate software license agreement in a form satisfactory to the software publisher or equipment manufacturer.

**C. Service Agreement**

Services provided under this Contract shall be in accordance with the NetApp Support Services and Software Subscription Terms and Conditions as set forth in Appendix E of this Contract. No changes to the NetApp Support Services and Software Subscription Terms and Conditions may be made unless previously agreed to by Vendor and DIR.

**8. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts.**

**A. Section 5, Product Terms and Conditions, Subsection B, Electronic and Information Resources Accessibility Standards, As Required by 1 TAC Chapter 213 (Applicable to State Agency and Institution of Higher Education Purchases Only)** is hereby revised to add paragraph 4 as follows:

**4.** Vendor believes that, based on evidence currently available, including analyses by GRC International, that Vendor's products may be exempt from the technical standards of Section 508 of the Rehabilitation Act, as implemented at 36 C.F.R. 1194 because:

**a)** Compliance would require a fundamental alteration in the nature of the products under 36 C.F.R. 1194.3(e); or

**b)** Vendor's products may be restricted to spaces frequented only by service personnel for monitoring purposes, under 36 C.F.R. 1194.3(f).

**B. Section 6, Contract Fulfillment and Promotion, Subsection A, Service, Sales, and Support of the Contract** is hereby restated in its entirety as follows:

Vendor shall provide service, sales and support resources to serve all Customers throughout the State. It is the responsibility of the Vendor to sell, market, and promote products and services available under the Contract. Vendor shall use commercially reasonable efforts to ensure that potential Customers are made aware of the existence of the Contract. All sales to Customers for products and services available under the Contract shall be processed through the Contract.

**C. Section 9, Vendor Responsibilities, Subsection 2, Infringements** is restated in its entirety as follows:

Vendor shall defend, indemnify and hold harmless the State of Texas and Customers, their officers, agents and employees, from any and all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the use of any Vendor product or service supplied under the Contract. Vendor agrees to defend against any and all third party claims at Vendor's expense, whether or not such claims become the subject of litigation provided the Customer: (i) notifies Vendor promptly in writing of such claim, (ii) grants Vendor control over the defense and settlement thereof, and (iii) reasonably cooperates in response to Vendor's requests for assistance. DIR will provide reasonable assistance in the defense of such claims if so requested by the Vendor. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as may be requested by DIR.

Vendor shall have no liability if the alleged infringement is caused in whole or part by: (i) use of the product or service in combination with product or services not provided under the Contract, (ii) use of the product or service for a purpose or in a manner for which the product or service was not designed, (iii) any modification made to the product without Vendor's written approval, (iv) any modifications made to the product by the Vendor pursuant to Customer's specific instructions, (v) any

intellectual property right owned by or licensed to Customer, or (vi) any use of the product or service by Customer that is not in conformity with the terms of any applicable license agreement.

If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense: (i) procure for the Customer the right to continue to use the affected portion of the product or service, (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing, or (iii) take back the allegedly infringing product or service and refund to Customer the purchase price paid thereof.

**D. Section 9, Vendor Responsibilities, Subsection H, Security of Premises, Equipment, Data and Personnel** is restated in its entirety as follows:

Vendor and/or Order Fulfiller may, from time to time during the performance of the Contract, have access to the personnel, premises, equipment, and other property, including data, files and /or materials (collectively referred to as "Data") belonging to the Customer. Vendor and/or Order Fulfiller shall use commercially reasonable efforts to preserve the safety, security, and the integrity of the personnel, premises, equipment, Data and other property of the Customer, in accordance with the instruction of the Customer. Vendor and/or Order Fulfiller shall be responsible for damage to Customer's equipment, workplace, and its contents when such damage is caused by its employees or subcontractors.

**E. Section 9, Vendor Responsibilities, Subsection J, Limitation of Liability** is hereby restated in its entirety to read as follows:

For any claim or cause of action arising under or related to the Contract: i) none of the parties shall be liable to the other for punitive, special, or consequential damages, even if it is advised of the possibility of such damages; and ii) Vendor's liability for damages of any kind to the Customer shall be limited to the total amount paid to Vendor under the Contract during the six months immediately preceding the accrual of the claim or cause of action or \$500,000, whichever amount is less.

**F. Section 10, Contract Enforcement, Subsection B, Termination, 6, Vendor or Order Fulfiller Rights under Termination** is hereby restated in its entirety as follows:

In the event a Purchase Order is terminated or the Contract expires or is terminated for any reason, a Customer shall pay all amounts accrued and due for products or services ordered prior to the effective termination date.

Vendor Contract No. \_\_\_\_\_

This Contract is executed to be effective as of the date of last signature.

**Network Appliance, Inc.**

**The State of Texas, acting by and through the  
Department of Information Resources**

**Authorized By: \_Signature on file\_\_\_\_\_**

**Authorized By: \_\_Signature on file\_\_\_\_\_**

**Name: \_\_Douglas Kent Snider\_\_\_\_\_**

**Name: Brian S. Rawson**

**Title: \_\_District Manager\_\_\_\_\_**

**Title: Director of Service Delivery**

**Date: \_\_July 20, 2006\_\_\_\_\_**

**Date: \_July 20, 2006\_\_\_\_\_**

**Legal: \_\_CK July 20, 2006\_\_\_\_\_**